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No. 80-129

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA, ET AL.,
Petitioners,

vs.

THE METROPOLITAN SCHOOL DISTRICT OF PERRY TOWNSHIP, MARION COUNTY, INDIANA, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT THE METROPOLITAN SCHOOL DISTRICT OF PERRY TOWNSHIP, MARION COUNTY INDIANA, IN OPPOSITION.

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QUESTION PRESENTED.

Whether the question of the adequacy of the remedy approved by the courts below, which is presented for review by the petitioner The Board of School Commissioners of the City of Indianapolis, Indiana, in No. 80-129, is moot where, after the judgment of the court of appeals sought to be reviewed was entered, the said petitioner opposed the motions filed by this and other respondent school districts for stay of mandate pending the filing by them of petitions for writs of certiorari in Nos. 79-1975 and 79-2067 and represented to the court of appeals that it was ready, willing and able, and indeed constitutionally required, to implement the one-way interdistrict busing remedy whose adequacy it now seeks to challenge and where the prevailing parties below have not made a similar challenge to the adequacy of such remedy.

LIST OF PARTIES.

The Metropolitan School District of Perry Township, Marion County, Indiana, which is designated in the caption of the petition as a "petitioner," and all of the other parties to the proceedings in the court of appeals except The Board of School Commissioners of the City of Indianapolis, Indiana, which are designated in the list of parties on page ii of the petition as "petitioners" and "other parties" should be designated "respondents" in this Court by reason of Supreme Court Rule 19.6. Likewise, since The Board of School Commissioners of the City of Indianapolis, Indiana was not a prevailing party below, its petition for a writ of certiorari is not properly designated as a "cross petition," and it has improperly designated itself as "cross-petitioner" in the caption.

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No. 80-129

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OCTOBER TERM, 1980

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA, ET AL.,
Petitioners,

vs.

THE METROPOLITAN SCHOOL DISTRICT OF PERRY TOWNSHIP, MARION COUNTY, INDIANA, ET AL.,
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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT THE METROPOLITAN SCHOOL DISTRICT OF PERRY TOWNSHIP, MARION COUNTY INDIANA, IN OPPOSITION.

STATEMENT OF THE CASE.

Petitioner The Board of School Commissioners of the City of Indianapolis, Indiana, operates the Indianapolis Public Schools (commonly referred to as "IPS"). On August 18, 1971, the district court, in a wide-ranging opinion,[1] held that IPS is an

1. Excerpts from this opinion are printed in the IPS Appendix, pages 1a-9a. Other appendices to which reference will be made in

(Footnote continued on next page.)

unconstitutionally segregated dual-school system. *United States* v. *Board of School Commissioners etc.*, 332 F. Supp. 655 (S. D. Ind. 1971), *affirmed*, 474 F. 2d 81 (7th Cir. 1973), *cert. denied*, 413 U. S. 920 (1973). It thereafter allowed respondents Donny Brurell Buckley and Alycia Marquese Buckley to intervene as plaintiffs representing a class of school-age Negro children residing in the area served by IPS and to file a complaint against other school corporations in Marion and adjoining counties seeking interdistrict relief. In denying motions by this respondent and others to docket the Buckley action as a separate civil action from the action decided by the district court's opinion of August 18, 1971, the district court held:

> "The Court recognizes that the main thrust of the added defendants' various motions to dismiss the intervening plaintiffs' amended complaint, or to sever and redocket the same as a separate action is that they cannot be bound by the findings made in this cause before they were made parties. This position is valid. Therefore, the action of the Court in overruling such motions is without prejudice to the right of such added defendants, on trial, to offer evidence in defense of the issues raised in both the original complaint and the intervening complaint, as amended, and the burden of proof as to the issues raised by the intervening complaint shall continue to be on the intervening plaintiffs, unaided by the findings of the Court entered before the joinder of the added defendants." (Entry for December 30, 1971)[2]

The claim asserted by respondents Buckley for interdistrict relief was first tried in 1973. In an opinion issued on July 20,

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(Footnote continued from preceding page.)
this brief are the appendix bound with this brief, the Joint Appendix filed with the petitions in Nos. 79-1975 and 79-2001 and the Supplemental Appendix filed with the petition in No. 79-2067.

2. The reference on page 6 of the IPS petition to findings of racial discrimination in housing contained in the 1971 opinion are thus irrelevant. In addition, the court of appeals held in its 1980 opinion that such findings in the 1971 opinion cannot support an interdistrict remedy. (Joint Appendix, pages A12-A13)

1973,[3] the district court held that a desegregation plan limited to IPS would cause white flight and not be viable and that the only feasible desegregation plan would involve the crossing of the boundary lines between IPS and adjacent or nearby school districts. Although the court expressly found that "there is no evidence that any of the added defendant school corporations have committed acts of *de jure* segregation directed against Negro students living within their respective borders" (IPS App. 29a), it went on, by way of *obiter dictum*, to place the blame for the concentration of blacks in the inner cities of America on racial discrimination in housing. That such *dicta* were not intended to be treated as findings of fact was made clear by the court in the following disclaimer:

> "The foregoing should not be taken to mean that this action is one having to do with discrimination in housing, and this Court does not consider that a school desegregation action is one in which it is appropriate to attempt to remedy such discrimination, past or present. * * *" (IPS App., page 32a)[4]

The holding of the district court that an IPS only plan would not be viable because of white flight was reversed by the court of appeals on August 21, 1974, 503 F. 2d 68, and the case was remanded for the prompt formulation of a decree directed to eliminating the segregation found to exist within IPS, the court of appeals observing:

> "* * * We must guard against permitting the 'white flight' considerations unduly to delay complete desegregation within IPS now that Milliken v. Bradley has disposed of the metropolitan remedy." (503 F. 2d at 80)

The court of appeals also instructed the district court to "determine whether the establishment of the Uni-Gov boundaries

3. 368 F. Supp. 1191. The July 20, 1973, opinion of the district court is printed in full in the IPS Appendix, pages 10a-44a.

4. Thus, the reference in the IPS petition on page 6 to racial discrimination in housing found in the 1973 opinion is also irrelevant.

without a like reestablishment of IPS boundaries warrants an inter-district remedy within Uni-Gov in accordance with *Milliken*." (503 F. 2d at 86)

Upon trial in 1975 pursuant to the foregoing remand, IPS took the positions (1) that it could implement a unitary school system within its own boundaries if permitted to do so and (2) that the establishment of the Uni-Gov boundaries without a like reestablishment of IPS boundaries did not warrant an interdistrict remedy. From the judgment entered by the district court on August 1, 1975,[5] ordering an interdistrict remedy,[6] IPS appealed and maintained the same positions on appeal. The court of appeals affirmed on July 16, 1976,[7] but this judgment was vacated by the Supreme Court on January 25, 1977, 429 U. S. 1068, and the case was remanded for further consideration by the court of appeals. In turn, the court of appeals on February 14, 1978,[8] vacated the district court's judgment of August 1, 1975, and remanded the case to that court for further findings of fact on whether the relevant acts or omissions of state or local officials were motivated, at least in part, by a racially discriminatory purpose.

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5. 419 F. Supp. 180. The August 1, 1975, opinion of the district court is printed in full in the Supplemental Appendix, pages A36-A47.

6. The August 1, 1975, opinion of the district court stated "that the Buckley plaintiffs should be regarded as the 'prevailing parties,' within the meaning of [20 U. S. C. § 1617], if the rulings of this Court relating to transfer of pupils become final, since they are the only parties who have contended for a remedy going beyond the IPS strait jacket." (Supplemental Appendix, pages A46-A47)

7. 541 F. 2d 1211. The July 16, 1976, opinion of the court of appeals is printed in full in the Supplemental Appendix, pages A1-A35.

8. 573 F. 2d 400. The February 14, 1978, opinion of the court of appeals is printed in full in the Joint Appendix, pages A54-A83.

Following remand, the district court on April 7, 1978,[9] determined that the existing record was sufficient for purposes of making the findings required by the mandate and that no further evidentiary hearing need be had. Thereafter, on May 8, 1978, IPS filed a motion asking the district court to realign IPS as a party plaintiff on the issues of interdistrict violation and remedy and to permit a further evidentiary hearing on the issues relating to an interdistrict constitutional violation.[10] The district court did not immediately rule on the IPS motion and adhered to the procedure outlined in its entry of April 7, 1978. On July 11, 1978, the district court filed its memorandum of decision[11] and entered a judgment reinstating its previous judgment of August 1, 1975, which had been vacated by the court of appeals.

Appeals by IPS and most of the respondents were taken from the district court's judgment of July 11, 1978, and IPS moved in the court of appeals for a limited remand for district court consideration of alternative remedy proposals. The IPS motion stated:

> "Ordering such a remand at this stage will *not* decide the pending appeals from the July 11 order insofar as they relate to intent and the existence of a so-called interdistrict violation at all. That issue will be preserved for decision on the pending appeals and can be consolidated for review with all appeals from the District Court's ruling on the remand." (Motion for limited remand, page 9, note 5)

The IPS motion was granted by the court of appeals on August 11, 1978.[12] In remanding the case to the district court for the

9. The district court's entry for April 7, 1978, is printed in the appendix bound with this brief, page A1, *infra.*

10. The IPS motion is printed in the appendix bound with this brief at pages A2-A3, *infra.*

11. 456 F. Supp. 183. The July 11, 1978, opinion of the district court is printed in the Joint Appendix, pages A84-A100.

12. The August 11, 1978, order for limited remand is printed in the appendix bound with this brief, pages A4-A6, *infra.*

limited purpose of hearing and deciding upon modifications of the judgment of July 11, 1978, as to remedy, the court of appeals preserved for its own decision the issues concerning the existence of any interdistrict violation at all.[13]

Following receipt of the mandate of the court of appeals on the limited remand, the district court on September 20, 1978,[14] denied the motion of IPS to be realigned as a party plaintiff. The court noted that in all of the proceedings theretofore had the positions of the respondents Buckley and IPS had been adverse and still were, and that once this litigation is terminated IPS may well be liable for substantial attorneys' fees to counsel for respondents Buckley as the prevailing parties. The court further observed that IPS may seek any relief against the respondent school corporations to which it feels entitled by cross-claim. No such cross-claim has been filed by IPS seeking an interdistrict school desegregation remedy.

At the trial on the limited remand, respondents Buckley opposed the alternative remedies urged by IPS and supported the one-way interdistrict busing remedy previously ordered by the court. On April 24, 1979,[15] the district court filed its memorandum of decision in which it reapproved the one-way interdistrict busing remedy and rejected the alternative two-way interdistrict busing remedies proposed by IPS[16] Judgment was entered by the district court on July 9, 1979.[17]

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13. Thus, IPS had no part in establishing the existence of the interdistrict violations found by the district court and cannot be deemed a prevailing party on that aspect of the case.

14. The district court's entry for September 20, 1978, is printed in the appendix bound with this brief, pages A7-A10, *infra.*

15. The April 24, 1979, opinion of the district court is printed in the Joint Appendix, pages A101-A129.

16. The district court found that the attorneys for the respondents Buckley, as the prevailing parties, are entitled to attorneys' fees. (Joint Appendix, page A128)

17. The July 9, 1979, judgment of the district court is printed in the Joint Appendix, pages A130-A135.

IPS appealed from the district court's judgment of July 9, 1979, and argued that the one-way relief ordered by the district court was inadequate to redress the effects of the interdistrict violations found and discriminatory and unfair to black students. The court of appeals rejected the IPS arguments and on April 29, 1980,[18] affirmed both the findings of constitutional violations[19] and the appropriateness of the one-way relief.

Following the decision of the court of appeals, this respondent and others moved in the court of appeals on May 12 and 16, 1980, for a stay of mandate pending application to the Supreme Court for writ of certiorari. Although IPS had opposed the one-way interdistrict busing remedy in the district court as inadequate and had argued the same on appeal, it now abandoned its opposition to implementation of the one-way remedy and filed a response urging the court of appeals to deny the motions for stay of mandate.[20] In its response IPS represented to the court of appeals that it was prepared to implement the district court's judgment in the Fall of 1980 and gave no indication that it itself intended to seek review of the adequacy of the remedy by filing a petition for certiorari. Just as IPS had previously switched sides on the issue of interdistrict constitutional violations, in the response it switched sides on the one-way busing remedy and supported its implementation. However, on May 29, 1980, the

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18. The April 29, 1980, opinion of the court of appeals is printed in the Joint Appendix, pages A-1-A53, and its judgment of the same date at pages A136-A137.

19. The issues concerning the existence of interdistrict violations on the appeals from the July 11, 1978, judgment of the district court had been preserved for decision by the court of appeals in the limited remand order.

20. The response of Indianapolis Public Schools (IPS) to motions of added defendants Perry and Lawrence Townships, et al., for stay of mandate, filed on May 22, 1980, is printed in the appendix bound with this brief, pages A11-A21, *infra.*

court of appeals granted the motions for stay of mandate with respect to the interdistrict remedy.[21]

SUMMARY OF ARGUMENT.

In opposing the motions for stay of the mandate on the judgment entered by the court of appeals affirming the district court's judgment, petitioner IPS waived its previous opposition to the one-way interdistrict busing plan and consented to its implementation. This Court does not consider errors in judgments that have been waived by consent.

Petitioner IPS is the only party not presently contesting the existence of any interdistrict constitutional violation at all that is seeking to have this Court review the adequacy of the remedy. But in going beyond what was required of it by the judgment sought to be reviewed, petitioner has mooted its case.

ARGUMENT.

In opposing the motions for stay of the mandate on the judgment entered by the court of appeals on April 29, 1980, affirming the district court's judgment of July 9, 1979, petitioner IPS clearly waived its previous opposition to the one-way interdistrict busing plan embodied in the latter judgment and consented to its implementation. With Emersonian disdain for consistency,[22] IPS now argues in its petition for a writ of

21. The May 29, 1980, order of the court of appeals is printed in the appendix bound with this brief, pages A22-A23, *infra*.

22. "A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines. With consistency a great soul has simply nothing to do. He may as well concern himself with his shadow on the wall. Speak what you think now in hard words and tomorrow speak what tomorrow thinks in hard words again, though it contradict everything you said today. * * *" Essay on Self-Reliance in "The Best of Ralph Waldo Emerson," page 127. (Walter J. Black: New York: 1941)

certiorari that the remedy it urged the court of appeals to permit it to implement is inadequate and inequitable and should not be implemented.

This Court does not consider errors in judgments that have been waived by consent. In *Pacific Railroad Company of Missouri* v. *Ketchum,* 101 U. S. 289 (1880), it was said:

> "* * * If, when the case gets here, it appears that the decree appealed from was assented to by the appellant, we cannot consider any errors that may be assigned when they were in law waived by the consent, * * *" (101 U. S. at 295)

The prevailing parties below, respondents Buckley, have consistently supported the one-way busing remedy. Respondent United States, the original plaintiff in the intradistrict action against IPS, did not seek interdistrict relief, and, in any event, has not petitioned for certiorari to review the judgment below. It is the position of the respondents who have filed petitions for certiorari to review the judgment of the court of appeals in this case[23] that there has been no interdistrict constitutional violation at all that would support an interdistrict remedy of any nature. Consequently, petitioner IPS is the only party not presently contesting the existence of the interdistrict constitutional violations that is seeking to have this Court review the adequacy of the remedy. But petitioner IPS has mooted its case by consenting to the remedy when it opposed the respondents' motions for stay of mandate.

It is well established that an unsuccessful litigant does not moot his case by complying with an unfavorable judgment pending the disposition of his appeal, but he does moot his case by going beyond what is required of him. Thus, a debtor does not moot his case by paying the judgment against him

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23. Petitions for writ of certiorari filed by respondents herein have been docketed as Nos. 79-1975, 79-2001, 79-2067, 80-99 and 80-115.

pendente lite, but he does moot his case by entering into a compromise in settlement of the debt. *Dakota County* v. *Glidden*, 113 U. S. 222 (1885). And if a union is enjoined from boycotting or striking at a particular store, the union does not moot the case by lifting the boycott or strike pendente lite, *Bakery Drivers* v. *Wagshal*, 333 U. S. 437 (1948), but the union might well moot its case if all the striking employees left the store and obtained employment elsewhere, *see Mancusi* v. *Stubbs*, 408 U. S. 204, 218 (1972) (Marshall, J., dissenting). Likewise, a petitioner does not moot his case by obeying a judgment without first seeking a stay of mandate, *Mancusi* v. *Stubbs, supra*, but he does moot his case by complying with a judgment when a stay has been granted, *see, Bakery Drivers* v. *Wagshal, supra*, at 442.

In opposing the motions for stay of the mandate on the judgment entered by the court of appeals on April 29, 1980, and in seeking to implement the district court's judgment of July 9, 1979, which the court of appeals had affirmed, petitioner went far beyond what was required of it. The result is that the question of the adequacy of the remedy ordered by the courts below, which is presented by the petition of IPS in No. 80-129 for a writ of certiorari, is moot.

CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari filed by The Board of School Commissioners of the City of Indianapolis, Indiana, should be denied.

Respectfully submitted,

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Attorney for Respondent The Metropolitan School District of Perry Township, Marion County, Indiana.

APPENDIX.

UNITED STATES DISTRICT COURT
Southern District of Indiana
Indianapolis Division

* * Caption—No. IP 68-C-225 * *

ENTRY FOR APRIL 7, 1978

S. Hugh Dillin, Judge

The Court, having considered the order of the Court of Appeals for the Seventh Circuit remanding this cause for further findings, is of the opinion that the present record is sufficient for such purpose, and that no further evidentiary hearing need be had.

It is therefore considered and ordered that all of the parties desiring to be heard on the issues presented on remand file their briefs in support of their respective positions in the office of the Clerk on or before May 22, 1978. Answer briefs may be filed on or before June 2, 1978, and this will conclude the briefing. There will be no oral argument.

UNITED STATES DISTRICT COURT
Southern District of Indiana
Indianapolis Division

United States of America,
Plaintiff,
and
Donny Brurell Buckley, et al.,
Plaintiff-Intervenors,
vs.
The Board of School Commissioners of the City of Indianapolis, et al.,
Defendants.

No. IP 68-C-225

MOTION TO REALIGN PARTIES AND TO PERMIT EVIDENTIARY HEARING ON THE BASIS FOR AN INTERDISTRICT REMEDY

Defendants, Board of School Commissioners and Superintendent (hereafter "IPS") hereby move the Court as follows:

1. To realign IPS as a party-plaintiff on the issues of interdistrict violation and remedy, interdistrict relief ancillary to pupil assignments and state responsibility for both interdistrict violations and assistance in effectuating the appropriate remedy.

2. To permit a further evidentiary hearing on the issues relating to an interdistrict constitutional violation.

3. In the event the Court, after such hearing, finds one or more interdistrict constitutional violations, to hold a subsequent hearing on the appropriate remedy in light of the violation or violations found, at which any relevant proposals or plans of school authorities may be submitted and considered.

In support of its motion IPS submits herewith a memorandum outlining its reasons for requesting a further evidentiary hearing and the nature of the evidence which IPS would expect to introduce.

Respectfully submitted,

/s/ John Wood
John Wood

/s/ Sigmund J. Beck
Sigmund J. Beck
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UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

August 11, 1978.

Before

Hon. Thomas E. Fairchild, *Chief Judge*
Hon. Luther M. Swybert, *Circuit Judge*
Hon. Philip W. Tone, *Circuit Judge*

United States of America,
Plaintiff-Appellee,

Donny Brurell Buckley and Alycia Marquese Buckley, etc., et al.,
Intervening Plaintiffs,

Nos. 78-1996 thru 78-2006, and 78-2039

vs.

The Board of School Commissioners of the City of Indianapolis, Indiana, the Metropolitan School District of Perry Township, Marion County, Indiana, and the Superintendent of Schools, President and Members of the Board of School Commissioners, et al.,
Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Indiana, Indianapolis Div. No. IP 68 C 225.

Judge S. Hugh Dillin

ORDER

This matter comes before the court upon the filing of the following documents:

1. The "MOTION OF INDIANAPOLIS PUBLIC SCHOOLS FOR LIMITED REMAND FOR DISTRICT COURT CONSIDERATION OF ALTERNATIVE REMEDY PROPOSALS" filed by the Indianapolis Public Schools on August 2, 1978;

2. The "RESPONSE IN OPPOSITION TO 'MOTION OF INDIANAPOLIS PUBLIC SCHOOLS FOR LIMITED REMAND FOR DISTRICT COURT CONSIDERATION OF ALTERNATIVE REMEDY PROPOSALS'" filed by Metropolitan School District of Lawrence, Warren and Wayne Townships on August 7, 1978;

3. The "MOTION FOR STAY PENDING APPEAL" filed by Metropolitan School District of Perry Township, Marion County, Indiana on August 7, 1978; and

4. The "MOTION OF APPELLANTS, BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, ET AL., FOR TEMPORARY RETENTION OF RECORD IN DISTRICT COURT UNDER F. R. A. P. 11(c)" filed by Board of School Commissioners of the City of Indianapolis, its Superintendent and members on August 7, 1978.

On consideration thereof, IT IS ORDERED, that this cause is remanded to the district court for the limited purpose of hearing and deciding upon modifications of the July 11th judgment in the nature of alternative remedy, plans and related evidence proffered by IPS (as well as any alternatives, objections, modifications, and rebuttal of any opposing parties) and hearing and making additional findings upon further evidence offered by any parties on the issue of which alternative remedy (including pupil reassignment, ancillary relief, and allocation of desegregation costs) is necessary and equitable to overcome the combined effect of all the constitutional violations previously found by the district court. Pending the determinations of the district court on this limited remand, and also for the convenience of counsel in preparing their briefs on appeal, the record shall be retained in the district court until further order.

All issues raised by the pending appeals, including but not limited, to intent and the existence of any interdistrict violation at all are preserved for decision by this court on the pending appeals and such subsequent appeals as may be filed from the orders of the district court on this limited remand.

This court assumes that the district court will rule upon the various motions for stay of the July 11, 1978 judgment pending appeal prior to the commencement of the 1978-1979 school session. And upon that assumption, this court defers ruling on the motions for stay filed in this court.

UNITED STATES DISTRICT COURT
Southern District of Indiana
Indianapolis Division

(* * Caption—No. IP 68-C-225 * *)

ENTRY FOR SEPTEMBER 20, 1978

This cause comes before the court on the motion of the original defendant IPS to be realigned as a party plaintiff. As the basis for such unusual request it alleges that it and the original plaintiff are agreed as to the adequacy of its proposed intradistrict desegregation plan, and that it adopts the interdistrict complaint of intervening plaintiffs Buckley, et al. The motion is denied.

In the first place, the intervening plaintiffs Buckley do not agree with the IPS intradistrict plan, but have opposed it. In the second place, IPS has only recently changed its position because the last school board election changed the views of the Board of School Commissioners on the subject of desegregation (i.e., a slate favoring desegregation was elected). The next election may well reverse the Board's position once again. This court should not be required to realign the parties following each election. Further, IPS may seek any relief against added defendants to which it feels entitled by cross-complaint. Another important consideration is that IPS may well be liable for substantial attorneys fees to counsel for the plaintiffs Buckley once this litigation is terminated: this most certainly results in an adverse situation between IPS and the Buckleys.

Various added defendant school corporations have filed their motions asking the court to vacate its entry of June 2, 1978 to the extent that such entry orders the original defendant IPS to formulate a plan for the transfer of black students to added defendants' schools. The motions are each denied as moot.

Finally, there is pending before the Court the applications of numerous attorneys for leave to appear in this cause on behalf of the defendant IPS. The applications of William L. Taylor and Thomas I. Atkins are granted. Those of Louis R. Lucas and Paul R. Dimond are denied.

The record in this case reflects that the said Louis R. Lucas and Paul R. Dimond appeared on October 21, 1971 as attorneys for the intervening plaintiffs Buckley, and, with other counsel, filed an amended complaint on behalf of such parties. Subsequently, in 1973, Lucas and Dimond were permitted to withdraw their appearances for said intervening plaintiffs, on the basis that there were substantial differences of opinion with original counsel for intervening plaintiffs.

Subsequent to the withdrawal of Lucas and Dimond as counsel for the intervening plaintiffs Buckley, said intervening plaintiffs won at least a partial victory in the case in that the Court entered its judgment of August 1, 1975, ordering the transfer of several thousand black students from IPS to the schools of certain added defendant school corporations, and enjoining the erection of additional public housing, except for the elderly, within IPS boundaries. 419 F. Supp. 180, aff'd 541 F. 2d 1211 (7 Cir. 1976), vacated and remanded 429 U. S. 1068 (1977), vacated and remanded 573 F. 2d 400 (7 Cir. 1978). After this Court gave further consideration to said judgment on remand, as ordered, and made additional findings of fact, it again, on July 11, 1978, entered an order identical with that of August 1, 1975, which latter order is now on appeal to the Court of Appeals for the Seventh Circuit.

In all of the proceedings heretofore had in this case, the position of the intervening plaintiffs Buckley and the defendant IPS have been adverse, and this is still true. In earlier proceedings, IPS appealed from this Court's order of August 1, 1975 on the basis that to the extent that it ordered the transfer of black students to suburban schools, it went too far, and was illegal; at this time IPS is appealing the same order on the basis

that it does not go for enough, and is illegal. The plaintiffs Buckley, at least until this point in the proceedings, have consistently defended on appeal the order of this Court.

Further, as pointed out above, the parties are adverse in that the intervening plaintiffs Buckley seek an award of attorneys fees for their original and present attorneys, John O. Moss, John Preston Ward, and Charles D. Kelso, from the defendant IPS, as well as from the added defendants.

The foregoing matters have been brought to the attention of the Court by the response to the Application for Appearance of Attorneys filed by the added defendants The Metropolitan School Districts of Lawrence, Wayne and Warren Townships, and by the objections of the intervening plaintiffs Buckley to the appearance of attorneys Lucas and Dimond. The Court cannot ignore what appears to it to be an obvious violation of the rules of professional responsiblity. See *Schloetter* v. *Railoc or Indiana, Inc.*, 546 F. 2d 706 (7 Cir. 1976); Canons 4 and 9, ABA Code of Professional Responsibility.

From the denial of permission to attorneys Lucas and Dimond to change sides in this case, it necessarily follows that their respective law firms, Ratner, Sugarmon, Lucas and Henderson, Memphis, Tennessee, and O'Brien, Moran and Dimond, Ann Arbor, Michigan, and all members and associates thereof, should be, and they are likewise prohibited from appearing for or counseling with IPS in this action.

This cause is assigned for further hearing on November 6, 1978 at 9:30 a.m., for the purpose of making further findings and orders as to the various matters set out by the Court of

Appeals for the Seventh Circuit in its limited order of remand dated August 11, 1978.

Dated this 20th day of September, 1978.

/s/ S. Hugh Dillin,
S. Hugh Dillin,
Judge

Copies to:

Louis R. Lucas, Ratner, Sugarmon, Lucas and Henderson, 525 Commerce Title Building, Memphis, Tennessee, 38103

Paul R. Dimond, O'Brien, Moran and Dimond, 320 North Main Street, Ann Arbor, Michigan, 48104

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Nos. 78-1800, 78-1971, 78-1996 through
78-2006, 78-2039, 79-1831 through
79-1838, 79-1874 and 79-1875

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

DONNY BRURELL BUCKLEY, ET AL.,
Plaintiffs-Intervenors-Appellees,

vs.

BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA, ET AL.,
Defendants-Appellees-Cross-Appellants,

METROPOLITAN SCHOOL DISTRICT OF PERRY TOWNSHIP, ET AL.,
Added Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Indiana

RESPONSE OF INDIANAPOLIS PUBLIC SCHOOLS (IPS) TO MOTIONS OF ADDED DEFENDANTS PERRY AND LAWRENCE TOWNSHIP, ET AL., FOR STAY OF MANDATE

By motions filed on May 9 and 15, 1980, several of the added defendant-appellant school corporations have sought further delay in the implementation of inter-district relief first ordered in this case almost seven years ago.[1]

1. The initial order to transfer students from IPS to schools of the added school corporations was issued on July 20, 1973 (368

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Defendants Lawrence, et al. and Perry argue that the previous grant of stays in this case justifies the granting of yet another delay. (Perry Motion p. 3, Lawrence Motion p. 2). Contrary to their assertions, however, this case is now in a significantly different posture than it was at the time of the stay issued by the Supreme Court in 1976 and even at the time of the stay issued by this Court on August 8, 1979.

When the Supreme Court remanded the case in 1977 (429 U. S. 1068) it was for reconsideration in light of two specific cases not specifically addressed by this Court in its 1976 opinion,[2] *Village of Arlington Heights* v. *Metropolitan Housing*

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F. Supp. at 1209). On August 24, 1974, this Court vacated and remanded for reconsideration in light of the Supreme Court's intervening decision in the *Milliken* case (503 F. 2d 68). On August 1, 1975, the District Court entered a new order substantially similar to the one here at issue requiring transfers of designated numbers of black students in IPS to the eight suburban districts (419 F. Supp. 180). That order was affirmed by judgment of this Court on July 16, 1976 (541 F. 2d 1211). On January 25, 1977, the Supreme Court vacated and remanded for reconsideration in light of the *Davis* and *Arlington Heights* decisions. 429 U. S. 1068. On February 14, 1978, this Court remanded the case to the District Court in a detailed opinion clearly identifying and delimiting the issues remaining in the case (573 F. 2d 400). On July 11, 1978, the District Court entered orders making findings on the issues remanded, directing the submission of specific plans for desegregation and requiring the state defendant to prepare a plan for the in-service training of teachers. After a further remand by this Court on August 11, 1978 to permit consideration of additional evidence on the remaining issues, the District Court scheduled hearings beginning in November, 1978. Those hearings resulted in the April 24, 1979 Memorandum of Decision and the July 9, 1979 order, which this Court affirmed, with a single exception, in its decision of April 29, 1980.

2. *Arlington Heights* of course could not have been considered by this Court since the Supreme Court's decision came after this Court's 1976 decision.

Development Corporation, 429 U. S. 252 [1977] and *Washington* v. *Davis,* 426 U. S. 229 [1976]. Since then there have been several important developments:

1) this Court's Opinion of February 14, 1978 carefully delineating the issues remaining to be resolved and setting out the criteria to be employed by the District Court in determining whether the challenged actions of defendants were infected with a racial purpose;
2) the District Court's July 11, 1978 and July 9, 1979 judgments on racial intent and on inter-district effects and remedy and its memorandum of decision of April 24, 1979 on these subjects; and
3) this Court's decision of April 29, 1980 holding that the District Court's findings of racial purpose in the legislative actions surrounding Uni-Gov and in the housing actions of defendant HACI were supported by the record and that the scope of the remedy ordered did not exceed the scope of the violations found.[3]

Accordingly, the issues that prompted the Supreme Court's remand have now been fully addressed both by the District Court and this Court and, contrary to the situation prevailing when previous stays were granted, no stay is now necessary to permit thorough consideration of the issues at the trial or circuit court levels.[4]

The sole question remaining is whether this Court should stay its mandate in anticipation of decisions by the Supreme Court to review and reverse the decision of this Court.

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3. The single exception to the affirmance—a determination that further proceedings are necessary to determine the effect of the Uni-Gov and HACI violations on added defendants Speedway and Beech Grove—is not involved in these stay proceedings since the two districts at present are not included in the order.

4. Appellants also appear to believe that the prior issuance of stays has determinative precedential significance whether or not circumstances have changed. By their reasoning it would appear that each successive stay would become a precedent for further delay, allowing relief to be postponed indefinitely.

IPS, notwithstanding its claims that the remedy ordered by the District Court and sustained by this Court is inadequate to redress fully the violations that have occurred, is prepared to go forward in the Fall of 1980 with intra and inter-district plans for desegregation. Because the added defendants have offered no persuasive reason in fact or law for additional delay in a case where the vindication of rights has already been so long postponed, IPS opposes the issuance of a stay.

A. The Context for Deciding Stay Requests in Constitutional Cases

Whatever the weight to be given to preservation of the *status quo* in other types of cases, defendants' assertion (Lawrence Motion p. 4) that it is a critical factor in stay applications in school desegregation cases is flatly wrong. As this Court appreciates, stays are not normally granted pending appeals in constitutional cases. Constitutional rights are "present rights . . . not merely hopes to some future enjoyment of some formalistic constitutional promise." *Watson* v. *City of Memphis*, 373 U. S. 526, 533 (1963).

Stays pending appeal of injunctions to remedy the continuing effect of constitutional violations found are therefore rare. In such circumstances, no bond can be given to the victims of the violation to ensure them against the further irreparable injury that would inevitably result from perpetuating the unconstitutional condition by granting a stay pending completion of appellate review. Given the inventiveness of lawyers to appeal from interlocutory orders at various stages of the remedial process in constitutional cases, grants of stays pending appeal would lead inevitably to lengthy delays. In such circumstances, preserving the *status quo* pending appeal would serve only to perpetuate constitutional violations and thereby irreparably harm the victims of the violation and the paramount interest in constitutional government. As a result, the general federal rule is

to deny stays of injunctions designed to remedy constitutional violations pending appellate review.

This general rule has specific force in school desegration cases. At least since *Alexander* v. *Holmes County Board of Education*, 396 U. S. 19 (1969) and *Carter* v. *West Feliciana Parish School Board*, 396 U. S. 266, 290 (1969) the rule has been applied in school cases to require desegregation "now" pending later litigation:

> Continued operation of segregated schools under a standard of allowing 'all deliberate speed' for desegregation is no longer permissible. Under explicit holdings of [the Supreme] Court the obligation . . . is to terminate dual school systems at once and to operate now and hereafter only unitary schools. 396 U. S. at 20.

As a result the Supreme Court has refused, absent extraordinary circumstances, to permit delays or stays in implementing desegregation decrees pending appeals, even in situations where review has subsequently been granted by the Supreme Court itself. See, e.g., *Swann* v. *Charlotte-Mecklenburg Board of Education*, 399 U. S. 926 (1970) (reinstating district court judgment pending review); *Edgar* v. *United States*, 404 U. S. 1206 (1971) (Black, J., denying stay); *Jefferson Parish School Board* v. *Dandridge*, 404 U. S. 1219 (1971) (Marshall, J., denying stay). Although *Alexander* dealt with a dual system in the South, the Court has rendered similar decisions in cases involving requests for stays of orders requiring desegregation of Northern school systems found to have engaged in *de jure* acts of segregation. See, e.g., *Board of Education of the City School District of the City of New Rochelle* v. *Taylor*, 368 U. S. 1, 825 S. Ct. 10 (1961) (Brennan, J., denying stay); *Keyes* v. *School District No. 1 of Denver*, 396 U. S. 1215 (1969) (Brennan, J., vacating stay); *Dayton Board of Education* v. *Brinkman*, 429 U. S. 1060 (Aug. 29, 1979) (Stewart, J., denying stay).[5]

5. Justice Stewart's denial of a stay in *Dayton* is particularly significant in view of the subsequent history of the case. The Supreme

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Certainly extraordinary circumstances may arise justifying the issuance of a stay notwithstanding the *Alexander* mandate of "desegregation now." See, e.g., *Corpus Christi School District* v. *Cisneros,* 404 U. S. 1211 (1971) where, unlike this case, Justice Black found that novel issues not previously considered by the Court were presented and that the case was in "an undesirable state of confusion."[6] As we shall demonstrate, added defendants have here presented no extraordinary circumstances which would warrant further delay in desegregation.

B. The Application of Traditional Stay Criteria

In ruling on defendants' applications for a stay, the burden is on defendants to show that:

1) they will suffer irreparable injury if the stay is denied;
2) that they will succeed on the merits of their appeal;
3) that plaintiff will not be substantially harmed by the stay; and
4) that no harm will be done to the public interest.

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Court later granted certiorari and reversed and remanded for further proceedings the judgment of the Court of Appeals because of substantial error in the handling of the case below. 433 U. S. 406 (1977). Nevertheless, the Court permitted the plan to continue in effect. When the case returned, Justices Stewart and Rehnquist denied stays 439 U. S. 1357, 1358 (August 30, 1978) and the Court subsequently upheld the judgment requiring systemwide relief.

6. While it is difficult to pinpoint the "extraordinary circumstances" that led to the issuance of a stay in *Columbus Board of Education* v. *Penick,* 439 U. S. 1348 (Rehnquist, J.) it is important to note that the stay was issued on August 11, 1978 by a single Justice when the Court was not in session. After *Columbus,* all subsequent applications for stays in school desegregation cases have been denied. See, *Dayton Board of Education* v. *Brinkman,* 439 U. S. 1357, 1358 (August 30, 1978) (Stewart, J. and Rehnquist, J.); *Buchanan* v. *Evans,* 439 U. S. 1360 (Sept. 1 and 11, 1978) (Brennan, J. and Rehnquist, J.) (*sub. nom. Alexis I. DuPont School District* v. *Evans*); *Vetterli* v. *United States Disrtict Court,* 435 U. S. 1304 (1978); *Adams* v. *United States,* 48 U. S. L. W. 3750 (May 20, 1980).

In essence the four criteria required weighing the harms to defendants, plaintiffs and the public in the absence or grant of a stay, in light of defendant's chances for succeeding on appeal. The burden is always on the party seeking a stay; and, in evaluating these factsor in cases involving constitutional rights, the general rule against granting delays in remedying the current impact of constitutional violations must be applied. The added defendants simply fail to meet their burden.

1. Success on Appeal Is Unlikely

At this late stage in the proceedings, added defendants have made no substantial showing that they are likely to prevail on the merits.

Almost all of the grounds for reversal alleged (See Lawrence Motion pp. 7-11) are contentions that defendants made to this Court and that were fully considered and rejected. Moreover, these challenges to the holdings of discriminatory intent and inter-district effects are challenges to findings of fact in which both the District Court and this Court have concurred. The Supreme Court ordinarily will not review factual findings made by both lower courts. *Graver Mfg. Co.* v. *Linde Co.*, 336 U. S. 271 (1949).

Most telling, the claim of added defendants that the issues are novel and that they are likely to prevail is decimated by the decisions of the Third Circuit and the Supreme Court in *Evans* v. *Buchanan*, 393 F. Supp. 428 (D. Del., 1975, aff'd, 423 U. S. 963 (1975); 416 F. Supp. 328 (D. Del., 1976), aff'd, 555 F. 2d 373 (3rd Cir., 1977), cert. denied 434 U. S. 880 (1977); 477 F. Supp. 982 (D. Del., 1978), aff'd 582 F. 2d 750 (3rd Cir., 1978) (*en banc*), stay denied 439 U. S. 1360 (Sept. 1, 1978) (Brennan, J.), cert. denied (*sub. nom. Delaware State Board of Education* v. *Evans*) 48 U. S. L. W. 3697 (April 28, 1980).

In *Evans*, inter-district relief was mandated for Wilmington and New Castle County, Delaware (and since September, 1978 has been in effect) on findings strikingly similar in all material

respects to the findings in this case. These include a historic condition of *de jure* segregation in the central city district unremedied at the time of trial and compounded by:

a) governmental involvement in housing discrimination which excluded central city black students from attendance at suburban public schools; and

b) a State enactment posing barriers to desegregation not justified by any substantial non-racial purpose. See, e.g., 393 F. Supp. at 431-32, 438, 445, 447.

In their challenge to the District Court's findings, added defendants fail utterly to come to grips with the impact of *Evans* on their contentions. For example, in making much of the claims that specific effects have not been ascribed to the enactments surrounding Uni-Gov and that Uni-Gov would not have been enacted except for the school district exclusion (Lawrence Motion p. 9) defendants fail to note that precisely the same observations apply to Delaware's Educational Advancement Act which froze Wilmington's boundaries and limited the opportunity to remedy *de jure* segregation. See 393 F. Supp. 428, aff'd 423 U. S. 963 (1975). Obviously the Supreme Court is not bound by its summary affirmance and denials of review in *Evans* to give effect to that decision in future cases and the Court on a petition for review in this case will consider purported distinctions between the two cases.[7] But defendants'

7. In the most recent denial of review in *Delaware State Board of Education* v. *Evans,* 48 U. S. L. W. 3697 (April 28, 1980) three Justices dissented and a fourth, Chief Justice Burger, agreed that the case merited review, "but only when a full Court is available to consider the important issues presented by the petition for certiorari." The remedy in *Evans,* however, contained a feature, the dissolution of 11 independent school boards, which Mr. Justice Rehnquist regarded as "more Draconian than any ever approved by this Court." The holdings in this case required no such restructuring of local boards. Moreover, the test that added defendants must meet is likelihood that they will prevail, not likelihood that they will obtain review. *Magnum Import Co.* v. *Coty,* 262 U. S. 159, 163 (1923);

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failure to deal with the single case most strikingly similar in its factual findings and conclusions of law does fatal damage to the legal justifications offered for seeking a stay pending appeal.[8]

2. The Equities Are Clearly Against the Issuance of a Stay

In assessing claims by a school authority that a stay of school desegregation order is necessary because immediate implementation would be infeasible or would cause disruption and harm, courts should be guided by the observation of Mr. Justice Marshall denying a stay request:

> Whatever progress toward desegregation has been made apparently, and unfortunately, derives only from judicial action initiated by those persons situated as perpetual plaintiffs below. The rights of children to equal educational opportunities are not to be denied, even for a brief time,

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Meredith v. *Fair*, 306 F. 2d 374, 376-378 (5th Cir., 1962), cert. denied 371 U. S. 820 (1962). As noted, the Supreme Court has refused to issue stays permitting delays in the implementation of desegregation decrees even in situations where review has subsequently been granted by the Supreme Court itself. *Swann; Edgar; Jefferson Parish, supra* p. 6.

8. The only other case substantially relied on by added defendants is the Supreme Court's summary affirmance (48 U. S. L. W. 3732) of a decision by a three-judge court denying inter-district relief in Atlanta (Lawrence Motion p. 11). Among the major differences between the instant case and *Armour* v. *Nix*, C. A. No. 16708 (N. D. Ga., Sept. 24, 1979) are: 1) *Armour* unlike *Indianapolis* involved no claim of an inter-district boundary violation; 2) in *Armour* unlike *Indianapolis*, all districts had become unitary before any claim for inter-district remedy was raised (Mimeo. Op. pp. 6-7); and 3) while *Armour* contained findings of housing violations similar in some respects to those made here, the trial court concluded that the violations had ceased and that plainitff had failed to demonstrate continuing effects, indeed crediting countervailing evidence that current patterns of segregation were due to nonracial factors. Mimeo. Op. pp. 18-22.

> simply because a school board situates itself so as to make desegregation difficult. *Jefferson Parish School Board* v. *Dandridge*, 404 U. S. 1219, 1220 (1971).

Added defendants have presented no substantiation of their claim (Perry Motion p. 9) that implementation of the remedy will result in irreparable injury to Perry and the students transferred from IPS. In fact, the contentions of irreparable harm amount in substance to noncognizable claims of administrative inconvenience. Even these claims are refuted by two factors. First, as set forth by IPS in its Response to Motion for Stay filed with this Court on July 27, 1979, substantial steps had already been taken last year to prepare for desegregation and to assure a peaceful, orderly process. (IPS Response pp. 13-16). Since these steps have already been taken and there is far more time for preparation in 1980 than was available in 1979, there is no reason to suppose that the process cannot be completed in a satisfactory manner. Second, this Court has already indicated its extreme reluctance to delay intra-district relief beyond September, 1980 (Slip. Op. p. 28) and IPS has determined not to seek delay of such a plan regardless of the status of the inter-district remedy. If inter-district relief is delayed beyond September, 1980, it is probable that some IPS students will have to be reassigned in 1980 and reassigned again in 1981 when an inter-district remedy is implemented. Thus, far from alleviating administrative inconvenience, a delay in implementing the inter-district remedy would add to it.

Ranged against the amorphous claims of harm put forward by the added defendants is the injury that will be incurred by minority students if satisfaction of their constitutional rights is delayed for yet another year.

For the foregoing reasons, this Court should deny the motions of added defendants Perry and Lawrence Townships, et al., for stay pending the filing of a petition for writ of certiorari.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

May 29, 1980

Before

Hon. Thomas E. Fairchild, *Chief Judge*
Hon. Luther M. Swygert, *Circuit Judge*
Hon. .....

Nos, 78-1800, 78-1871, 78-1996 through 78-2006, 78-2039, 78-2221, 79-1831 through 79-1838, 79-1874 and 79-1875

United States of America,
Plaintiff-Appellee,

Donny Brurell Buckley and Alycia Marquese Buckley, etc.,
Intervening Plaintiffs-Appellees,

vs.

The Board of School Commissioners of the City of Indianapolis, Indiana, et al.,
Defendants-Appellants,

The Metropolitan School District of Perry Township, Marion County, Indiana, et al.,
Added Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. IP 68-C-225

S. Hugh Dillin,
Judge.

This matter comes before the Court on the filing herein of the following documents:

1. "MOTION TO STAY MANDATE PENDING APPLICATION FOR CERTIORARI" filed herein on May 12, 1980 by the "Perry" added defendants-appellants.

2. "MOTION OF CERTAIN ADDED DEFENDANTS APPELLANTS FOR STAY OF MANDATE" filed herein on May 16, 1980.
3. "RESPONSE OF THE UNITED STATES TO MOTION OF PERRY TOWNSHIP TO STAY MANDATE PENDING APPLICATION FOR CERTIORARI" filed herein on May 16, 1980.
4. "RESPONSE OF INDIANAPOLIS PUBLIC SCHOOLS (IPS) TO MOTIONS OF ADDED DEFENDANTS PERRY AND LAWRENCE TOWNSHIP, ET AL., FOR STAY OF MANDATE" filed herein on May 22, 1980.

Certain defendants-appellants have requested this Court to stay the issuance of the mandate pursuant to our opinion filed April 29, 1980. Movants request that we stay only those portions of the mandate which would require the transfer of IPS students into non-IPS districts, which would require the hiring by the non-IPS districts of teachers rendered surplus in the IPS district, and which would require the adoption of in-service training programs by the non-IPS districts. With respect to these portions of our opinion, the issuance of the mandate is hereby stayed to and including June 30, 1980. As to all other portions of our opinion, the mandate shall issue forthwith.